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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

No. 63

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.,

Respondents.

BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE IN REPLY TO BRIEF OF PETITIONER INTERNATIONAL HEATER COMPANY.

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Counsel for Respondents Reorganization Committee.

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Opinions of the Courts Below

The opinion of the District Court filed simultaneously with the entry of the final decree of sale is printed at pages 280-283 of the printed Transcript of Record. The opinion of the District Court filed in connection with the decree confirming sale is printed at page 463 of the Record. Neither of these opinions has been published. The opinion of the United States Circuit Court of Appeals for the

Third Circuit is reported in 64 Federal Reporter (2d Series) at page 847, *et seq.*, and appears in the printed Transcript of Record at pages 534-544.

Jurisdiction

The jurisdiction of this Court rests on § 240a of the Judicial Code as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347a).

Statement of the Case

As in the case of the briefs of the other petitioners in these and companion cases, it is incumbent upon Respondents at the outset to rectify the erroneous picture painted by the numerous inaccuracies and omissions set forth in the brief of petitioner International Heater Company (*figures in italics referring to pages of said petitioner's brief*).

International Heater Company is the owner of $60,000 of serial notes, which are part of a total of $100,000 of such notes, all dated December 31, 1928 and maturing at the rate of $20,000 on December 31st of each year, beginning December 31, 1929. The $20,000 note maturing December 31, 1929 and the $20,000 note maturing December 31, 1930 were paid. The notes now held by International Heater Company by their terms mature as follows: $20,000 on December 31, 1931, $20,000 on December 31, 1932 and $20,000 on December 31, 1933; interest in each case being payable at maturity (R. 132). The entire $100,000 of notes were taken by International Heater Company as the purchase price for the sale by it to National Radiator Corporation of one-third of the capital stock of a corporation known as Lincoln Radiator Company (R. 435). The other

two-thirds stock interest in this Company had come to National Radiator Corporation from two of its constituent companies, at the time of the merger of 1927. Hence, these notes are in exactly the same category as the Debentures of the defendant. They were issued as funded debt of the Corporation, in connection with the acquisition of capital assets. International Heater Company, as the holder of these notes, is thus just as much a member of "the security holder class" as any holder of Debentures. Since the consideration for these notes was capital stock, it is obvious that International Heater Company is not a merchandise creditor and has not, as frequently stated in petitioner's brief (*8*), **invested any money** in National Radiator Corporation. It is also obvious, that the acceptance of these notes by International Heater Company was just as much a voluntary act on its part in connection with its sale of stock as was the investment in Debentures by the Debentureholders. Petitioner's *ex parte* version (*20, 21*) of what led up to its acceptance of these notes is not supported by the Record, as petitioner at page *20* of its brief admits, nor is it relevant to these proceedings. The recriminations in petitioner's brief can have no bearing on its present legal rights as a holder of the notes which it accepted in 1928.

It is not true, as stated in the petitioner's brief, that "every other creditor not a Debentureholder is to be paid in full" or that the petitioner International Heater Company "has been arbitrarily transferred from its own class into the security holder class" (*3*). The only creditors who are to be paid in full under the provisions of the Plan of Reorganization are creditors for "taxes, wages, services and merchandise" (R. 37). In the first place, no creditors,

other than those having a statutory preference (such as taxes and wages), are to be paid in full out of the receivership estate. **It is the New Company, the assenting creditors, which will assume and pay the liabilities for services and merchandise** (R. 37). At the time the decree was entered, outside the Debenture indebtedness, there was owing to pre-receivership creditors a total of $157,511.89 (R. 295). Of this amount, $40,075.15 was owing to merchandise creditors (R. 462); and the amount due for personal services was negligible (R. 461). The remainder of this unsecured indebtedness consisted of the $69,977 owing on petitioner's notes for principal and interest and a large number of other miscellaneous claims which are listed in detail in the Statement of the Receivers filed with the District Court on July 28, 1932, as provided in Section 54 of the decree (R. 343). There is at least $40,000 and perhaps as much as $65,000 (depending on the Court's settlement of claims under leases*) owing to general creditors other than Debentureholders and International Heater Company, which is not within the category of liabilities which are to be paid in full by the New Company. The true fact is that International Heater Company has not been arbitrarily put in a special class. It has been kept in the class to which it properly belongs; and this was the holding of the Circuit Court of Appeals (R. 543).

It was not the Receivers, but the Respondents (as complainants below) and Bankers Trust Company, Trustee, who applied to the District Court to fix an upset price and for a decree of sale (*3*).

The petitioner was not only permitted to intervene in this cause on March 31, 1932 (R. 133), but it had two months

*See page 69 of the Statement of Receivers, which is an original exhibit filed with the Clerk of this Court (Supp. R. 551).

between the time of its intervention and the entry of the decree of sale on May 31, 1932 (R. 283) to make any application to the Court which it might desire, and thereafter a period of more than eleven weeks in which to prepare evidence and to submit the same at the hearing on confirmation of sale held August 18, 1932 (R. 389, *et seq.*). At this hearing, counsel for the petitioner was present and neither then nor at any other time was petitioner "refused a hearing and treated with disdain" (*11*) or denied the opportunity "to offer evidence" (*19*).

Finally, the petitioner avers (*26*), that the Reorganization Plan promulgated by the respondents "was to be submitted to the 'security holders' and not to this petitioner", which, of course, is not true, since the Plan itself provides for the inclusion of the petitioner, expressly stating that "all general creditors of the Corporation * * * whose claims shall be duly established, unless such claims are otherwise adjusted, shall be entitled, upon the consummation of the Reorganization, to receive new securities upon the same basis as the holders of the existing 6½% Debentures of the Corporation" (R. 44). Moreover, the Chairman of the Reorganization Committee, very early after the Reorganization Plan had been promulgated, wrote to the petitioner a letter stating that petitioner would be admitted to participation in the Plan of Reorganization upon the same basis as the Debentureholders (R. 431, 457).

ARGUMENT

I.

Every creditor had ample opportunity to be heard with respect to the sale of the defendant's properties and the adequacy of the purchase price.

The judicial sale of course was consummated only upon its confirmation by the District Court by its decree of September 8, 1932 (R. 463), after the hearing of August 18, 1932.

Nevada Nickel Syndicate v. *National Nickel Co.* (D. Nev., 1900), 103 Fed. 391.

Petitioner apparently proceeds upon the theory that its failure to be present at the hearing on upset price was, in and of itself, a complete deprivation of all opportunity to be heard as to the adequacy of the purchase price of the properties sold under the decree of sale. We submit that this theory of petitioner rests upon a complete misconception of the purpose and function of upset price in connection with a public judicial sale. The adequacy of the purchase price was to be determined at the hearing on confirmation and the determination and fixing of an upset price prior to that hearing was only in the interest of possible bidders and to avoid the necessity of a resale were the purchase price not adequate, in the light of all the circumstances. As stated by the Court in *Guaranty Trust Co.* v. *Chicago, M. & St. P. Ry. Co.* (N. D. Ill., E. D., 1926), 15 Fed. (2d) 434, at 442:

> *"Manifestly the naming of an upset price is not a ruling that a bid as low as the upset price will be approved in the end* * * *. And when the bids are be-

fore the court their adequacy will be determined in the light of all the circumstances after an opportunity has been given to all stockholders, bondholders and other parties in interest to be heard * * *.

"* * * *And the court is always in a position to protect the rights of all parties upon the formal consideration of a bid actually made* * * *

"* * * The question (of upset price) is entirely different from that of the adequacy of a bid which has been actually made, and which is formally before the court for acceptance. The court is asked to indicate its view as to the very lowest bid for whose adequacy the proponents will be permitted to contend when it is brought before the court. If the adequacy of a bid is fairly debatable, and no higher bid is offered, certainly a chance should be given upon a formal hearing to support the bid. It was with this in mind that the hearing as to the upset price has been upon affidavits." (Italics ours)

The fixing of an upset price is not a necessary element of proper procedure in a public judicial sale (unless required by local statute) and in the Federal courts a decree of sale without any upset price is proper, leaving the whole question of the adequacy of the purchase price for determination at the hearing on confirmation of sale.

Provident Life & Trust Co: v. *Camden & T. Ry. Co.* (C. C. A., 3rd Cir., 1910), 177 Fed. 854.

In fact, in *Simon* v. *New Orleans, T. & M. R. Co.* (C. C. A., 5th Cir., 1917), 242 Fed. 62, a petition by a minority bondholder requesting the fixing of an upset price was denied, reserving to him the right to oppose confirmation.

After the sale had been directed by the decree of May 31, 1932 (R. 283), notice of sale was duly published once a

week for four consecutive weeks, beginning July 6, 1932, in newspapers in the cities of New York, Buffalo, Boston, Baltimore, Washington, Richmond, Trenton, Pittsburgh, Johnstown, Cincinnati and Chicago (R. 368). The notice of sale itself gave more than six weeks' specific notice that a hearing would be held at 10:30 A. M. on August 18, 1932 before the District Court, to consider the confirmation of the sale and to hear complaints as to the fairness of the Plan of Reorganization. The sale was held on August 8, 1932. On August 12, 1932, a further notice of the hearing upon confirmation and the fairness of the Plan was published in the same newspapers in which the notice of sale had been published (R. 465), so that there can be no question but that all concerned and particularly this petitioner had full opportunity to prepare for the hearing and to produce witnesses to show that the bid price was inadequate and/or that the Plan was unfair, if that was in truth its firm conviction. At this hearing, counsel for International Heater Company was present, but was not prepared to offer any testimony, although the Court assured him that he might introduce any testimony he desired (R. 396). Although that was the proper time and place for him to protest against the impropriety of the sale or the inadequacy of the bid, and although one of the written objections filed by this petitioner was that the price bid was grossly inadequate, counsel for the petitioner stated to the Court only that he would like to produce testimony as to the "general fairness of the plan" and "many other inequities in this plan" (R. 394 to 396), but he did not suggest that he would like to offer any evidence as to the adequacy or inadequacy of the bid. An examination of the Record will show that this petitioner's real grievance was, that

petitioner was not to be paid in full under the terms of the Plan as were the merchandise creditors. Counsel for this petitioner admitted that he had had notice of the hearing for some considerable time, but stated "I didn't want to bring a lot of witnesses here without knowing what would be heard or gone into" (R. 396), notwithstanding that the decree of May 31, 1932, entered two months after the petitioner had become a party to this cause, provided in Section 34 (R. 299) that the purpose of the hearing was **"to order the confirmation or disapproval of said sale, to order such further and other sale, if any, as may be deemed advisable,** to hear complaints upon the matters referred to in Section 36 of this Decree and to make such orders in the premises as it may deem proper", and notwithstanding that Section 36 of the decree (R. 302) provided that at this hearing **"this Court will hear complaints as to the equity of the provisions of any such plan or agreement of reorganization, including the Plan and Agreement hereinabove referred to,** affecting the respective priorities of all persons and corporations interested in National Radiator and its property", and notwithstanding that the notice published on August 12, 1932 contained similar notice of the precise purpose of the hearing.

The petitioner International Heater Company, had known of the receivership long before the hearing on upset price and had retained counsel at Pittsburgh to watch these proceedings (R. 452), but had not asked leave to intervene or asked counsel conducting this suit to keep it advised as to the course of proceedings, as had First National Bank of Cincinnati (R. 448-450). Petitioner did intervene as a party by order entered March 31, 1932 (R. 133). In its petition for leave to intervene, petitioner refers to the

hearings on upset price which took place on March 3 to 7, 1932 and states that its rights have been unprotected and that "the court could protect the rights of your petitioner much more fairly and adequately if your petitioner were a party to this litigation and thus in a position properly to present its evidence" (R. 131). The prayer of the petition was, that petitioner "may be made a party defendant to this suit and allowed to intervene and defend the same; or that it be permitted to file a bill of intervention and have such other and further relief as may be just and equitable" (R. 132). For some reason, however, this petitioner, although it claimed in its petition, and now claims, to have been aggrieved by the character and conduct of the proceedings which had been had, did nothing. It did not attempt to defend this suit, nor did it file any bill of intervention or ask for any other relief. It made no application to the Court for an opportunity to be heard or to produce testimony on any subject. **This petitioner remained quiescent while the Court had the matter under advisement for two months, and did not become active until July 23, 1932, three and one-half months after its intervention, and seven weeks after the entry of the decree,** when it joined with First National Bank of Cincinnati in appealing from the decree of sale (R. 332), after the publication of notice of sale had been practically completed at great expense (R. 368). So far as the Record shows, International Heater Company intervened solely for the purpose of joining with First National Bank of Cincinnati in appealing from any decree that might be entered and not with any earnest purpose of seeking an opportunity to be heard on the entry of a decree of sale. Thus, this petitioner is in the position of seeking to make the most of alleged de-

fects in the proceedings which were had, although it never availed itself of its ample opportunity to remedy these defects. The law does not tolerate that a party who might have taken an objection to the time, terms, and manner of the sale, as provided for in the decree, should designedly wait until the property has been offered for sale, and then attempt to frustrate or set aside the sale.

Nevada Nickel Syndicate v. *National Nickel Co.* (D. Nev., 1900), 103 Fed. 391, 394;
Leadville Coal Co. v. *McCreery* (1891), 141 U. S. 475, 478.

As was said by the Court in *Simon* v. *New Orleans T. & M. R. Co., supra,* page 64:

> "The original order was intended to preserve petitioner's rights to object to the confirmation of the sale for inadequacy of price or for any other legal reason * * * Petitioner has not availed himself of his right to oppose the sale, *but has attempted to engraft another form of action, sui generis, on the proceedings heretofore had.*" (Italics ours)

In this connection, petitioner also makes the charge that its co-petitioner, First National Bank of Cincinnati, was not given notice of these hearings, but only "fortunately learned of the proceedings and was present" (*6*); and at page *18* of its brief petitioner categorically asserts that this was an intentional omission. This charge of want of good faith on the part of counsel for the Respondents was made at the hearing before the District Court on confirmation of sale and was indignantly denied at that time by counsel. (R. 450). It is not made in the brief of First National Bank of Cincinnati and we had assumed that counsel for the petitioners no longer entertained any doubt that am-

ple notice of the hearing had been given to the First National Bank of Cincinnati in pursuance of its previous request. As the point has been raised again in this Court, the challenge to the integrity of counsel makes it incumbent upon us to remove all doubt on this score. To this end, we include a copy of a letter written under date of February 18, 1932 (two weeks before the hearing), by counsel for the Respondents to counsel for the First National Bank of Cincinnati, reading as follows:

(Letterhead of Milbank, Tweed, Hope & Webb)
15 Broad Street
NEW YORK

"February 18, 1932

National Radiator Reorganization

Mr. Ralph Royall,
20 Exchange Place,
New York, N. Y.

Dear Mr. Royall:

I assume that you have already received advices from Mr. Horace Baker of Pittsburgh, that a hearing will be had on March 3, 1932 before the Federal Court in Pittsburgh, for the purpose of settling a decree of sale which will involve, among other things, the fixing of upset prices. In any event, I am writing you in accordance with my assurance that I would advise you in advance of any such hearing.

Very truly yours,

Lawrence Bennett."

II.

The Plan of Reorganization was fair and there was no error by the lower Courts in approving it.

The petitioner sets forth in its brief at some length the reasons for its unwillingness to participate in the Plan of Reorganization. Fundamentally the petitioner is not satisfied with the management. This, of course, is a matter of opinion, but we submit that this suit was not, and could not properly have been converted into, a trial of the management. This opinion of petitioner, which is a competitor of National Radiator Corporation, cannot have any bearing upon the question as to whether the Plan accords fair treatment to all creditors. International Heater Company has no greater rights than any other non-assenting creditor, who may have some other reason for declining to join in the reorganization. So far as the Record is concerned, the fact is that the management of the New Company, which did not assume the direction of the defendant until February 1930 (R. 452, 453), is the same management which conducted the operations of the old National Radiator Company of Pennsylvania with conspicuous success. There is certainly nothing in the Record to support the assertion of mismanagement on the part of anyone. The letter of February 28, 1931, published by the so-called "Protective Committee", has no probative force whatsoever. At the most, this letter is a mere assertion of a group of individuals who had no intimate knowledge of the Corporation's affairs, and the fact that they later approved and adopted the Plan of Reorganization in itself constitutes a retraction of their charges and an affirmance of their confidence in the management of the New

Company. If, however, this petitioner continues to believe that the properties of National Radiator Corporation have been and will be mismanaged, it is privileged to maintain that belief and to refuse to participate in the reorganization. But this belief cannot change petitioner's rank or entitle it to preferential treatment.

This petitioner, like its co-petitioner First National Bank of Cincinnati, attempts to belittle the fact that the holders of 96% of the outstanding Debentures consented to the Plan, and petitioner surmises that this is no evidence that they approve the Plan, but merely shows that they joined the Plan because they knew not where else to go. By a curious process of logic, petitioner deduces from this surmise that probably the Plan was no good. We do know, however, that for nine months, while the so-called "Protective Committee" was in existence and actually opposing the Plan and while there *was* somewhere else to go, 80% of all the outstanding Debentures were deposited under the Plan; and we also know, that after this Protective Committee had approved the Plan, there was in existence a second Protective Committee (R. 399, 400) which acquired only $71,000 of Debentures and which is represented by Amy Arzt, the petitioner in companion case No. 64. Of course, we have no means of proving the mental processes of the thousands of Debentureholders who deposited under the Plan of Reorganization, but there is no foundation for the surmise that they deposited because they knew no better. We also know that the banking houses which had sponsored this issue (R. 417) approved the Plan as good, and we know that Moody's Investors Service in its Bulletin of February 17 and 18, 1931 gave its wholly disinterested recommendation of the Plan of Reorganization (R. 356).

Petitioner's only specific complaint which goes to the fairness of the Plan of Reorganization, is that the Plan provides that certain specified liabilities of the defendant shall be paid in full by the New Company. Let us see what this really amounts to. The liabilities which are so to be paid in full are liabilities for taxes, wages, services and merchandise. There is no question about the propriety of paying taxes or wages which are by statute entitled to a preference.* It comes down then to the question of services and merchandise.

As we have pointed out above at page 4, the amount due for personal services is negligible (R. 462) and the amount due to merchandise creditors is only $40,075.15 (R. 462), out of a total indebtedness, other than Debenture debt, of $157,511.89 (R. 295); and as already shown above, there is at least $40,000 owing to general creditors, other than Debentureholders and International Heater Company, which is not provided by the Plan to be paid in full. International Heater Company has not been "singled out" for unfavorable treatment. This petitioner's real grievance is that it has not been accorded the favorable treatment which the Reorganization Committee thought wise to accord to merchandise creditors.

There were sound practical reasons for paying merchandise creditors. The claims for merchandise were 396 in number (R. 459), all open accounts of comparatively small but odd amounts, averaging about $100 each. The expense and labor of issuing new securities for so many small claims was wholly disproportionate to the amount involved. For example, a merchandise creditor with a claim of $75.50 would, if treated like Debentureholders, receive scrip for

*43 Purdon's Pa. Statutes Annotated (1931), § 221.

$37.75 of New Debentures, another piece of scrip for .3775 of a share of new preferred stock, a certificate for one full share and a further piece of scrip for .51 of a share of new common stock. Under these circumstances, the Reorganization Committee considered it wise and proper as a business matter to preserve good credit relations with merchandise creditors.

Nevertheless International Heater Company complains that this provision of the Plan makes the Plan unfair. And by this we suppose is meant, that International Heater Company would receive unfair treatment if it participated in the Plan; that is, would suffer some pecuniary disadvantage. Let us see what the unfairness would amount to if International Heater were to participate in the Plan.

These merchandise creditors are admittedly entitled to their distributive share of the cash proceeds of this sale, and we may assume that this would come to 20 cents on the dollar. It means then that the total preferment of all the merchandise creditors amounts to 80 cents on the dollar for claims of $40,075.15, which is about $32,000. International Heater Company's share of the total corporate indebtedness is slightly over ½ of 1%. **In other words, the money damage to International Heater Company by reason of the alleged unfairness is ½ of 1% of $32,000, or $160.**

The question before the District Court was not whether this is a perfect plan of reorganization, or whether it is or is not the best business judgment to make the provision for the payment of merchandise creditors. The only question was whether this Plan as written and approved by 96% of the creditors is so unfair that it does not merit the approval of a court of equity. Courts do not sit to redraw or modify such voluntary business arrangements.

Conley v. *International Pump Co.* (S. D. N. Y., 1915), 237 Fed. 286.

Petitioner's brief advances the novel doctrine that "short-term creditors" have some prior right or preference over long-term creditors. Petitioner's argument is in substance that a "short-term creditor" (how short is not made plain) has some right to insist that the early maturity of his debt obligates the debtor to bleed itself to the last penny of cash and to wreck the business in utter disregard of all other creditors, so as to pay each short-term creditor in the order of maturity as long as the money lasts. There is no authoritative basis for any such doctrine and petitioner cites none. Even if there were such a doctrine of preference for "short-term creditors", the actual application of the principle to the instant case would not produce the result desired by petitioner. Petitioner's notes mature, $20,000 on December 31, 1931, $20,000 on December 31, 1932 and $20,000 on December 31, 1933. If the principle of payment in order of maturity is to be adhered to, petitioner must grant the rights of the Debentureholders to receive their semi-annual installments of interest and sinking fund as they mature. They too are short-term creditors. Thus, in the application of petitioner's own principle, it is true that petitioner would receive payment in full of only the $20,000 note maturing on December 31, 1931, but, long before the maturity of its next maturing note due December 31, 1932, every penny of the Corporation's cash would have been more than exhausted by the payment of interest and sinking fund installments to Debentureholders, as required by the terms of their Debentures and the Indenture.

It may be observed, however, that the doctrine advanced

by petitioner, in its application to the instant case, would have involved a preference under the Bankruptcy Act even as to the note due December 31, 1931. On any fair valuation, the liabilities of National Radiator Corporation exceeded its assets at December 31, 1931, and payment of petitioner's $20,000 note due on that day would clearly have been a preference. Petitioner's frequent allusions to the defendant as a "perfectly solvent corporation" are of course rhetorical and utterly at variance with the evidence and with the findings of the Courts below (R. 523-524 and 537).

Finally, if there is any merit in the claim of petitioner to be paid in full as a preferred "short-term creditor", this is a claim which petitioner should assert by application to the District Court for full payment of its claim out of the proceeds of the sale of the Corporation's property. Such a claim should not be asserted by appeal from the decree of sale or the decree confirming the sale. These decrees did not properly deal with questions of priority in the distribution of the proceeds of sale, all of which were reserved by the District Court for further consideration (R. 310).

III.

The provisions of the decree of sale were proper and the sale made thereunder was properly confirmed.

In specific criticism of the decree, the petitioner first complains (*5*) that Respondents were given an advantage, in that the Court allowed them $300,000 "to carry out their plan" and allowed "nothing at all to non-

assenting creditors for the purpose of presenting their side of the case". But the fact is that the Court did no such thing. Thus far, the Court has allowed nothing to the reorganizers to carry out their Plan. All questions as to allowances were, by the decree, reserved for further determination (R. 310), and when the matter of allowances is presented to the District Court, petitioner will have ample opportunity to be heard. The $300,000 referred to is a part-payment of the purchase price required by the District Court and, under the terms of Section 48 of the decree of sale (R. 309-310), this fund is in part to be used for administrative allowances, including unpaid indebtedness and liabilities and compensation of the Receivers and will in large part be used also to pay the distributive dividend upon $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization. There is no reason why petitioner should not bear its small *pro rata share* (about one-half of one per cent.) of the legitimate costs and expenses of this suit, which is to produce the fund out of which petitioner will be paid. In any event, 96% of these costs and expenses will be borne by the creditors who assent to the Plan. It is of course erroneous to say that the "present decree makes the non-assenting creditors alone pay their opponent's expenses and allowances" (5).

Petitioner criticizes the inclusion of cash in the sale and intimates that it was included to create a deceptive upset price. We fail to understand what the deception is, but the fact of the matter is that the inclusion of the cash in the sale was primarily a matter of convenience. Every one knows that cash is cash, and the inclusion of the cash in the property sold had no bearing upon the upset price

for the property other than cash, and for the same reason has no bearing upon the ultimate distributive share of non-assenting creditors. The inclusion of the cash in the properties sold, however, does facilitate getting the cash into the hands of the New Company, where it would ultimately go in any reorganization, and, if it were not included as a part of the properties sold, it would have to be distributed as a dividend and 96% of it would go to the Reorganization Committee, who would then turn it over to the New Company. The inclusion of cash in the sale is simply to avoid this cumbersome process. The result to everyone is the same. At the time of the sale, there was $1,551,615.78 cash and equivalent on hand (R. 402). If it had been excluded from the sale and left with the Receivers, the Reorganization Committee would have been entitled as the holders of about 96% of the debt to receive on distribution $1,440,000, and the pro rata share of the $400,000 of non-assenting claims would be about $60,000.

Petitioner criticizes the method of selling, on the ground that it was too well adapted to exclude all bidders except the Reorganization Committee (*13*). Complaint is made of that provision of the decree with respect to offering the property first in parcels and then as an entirety (R. 300). This is a customary provision and is sanctioned by the courts. In *Quinton* v. *Neville* (C. C. A., 8th Cir., 1907), 154 Fed. 432, 438, in approving a similar provision, the court said:

> "There is an important provision of the decree, well to be noted. It provides for the sale of the divisional parcels separately, and at the conclusion thereof the master shall put the whole tract up and offer it in bulk, with directions to accept the bid or bids which

produce the larger sum of money. This is the customary method of conducting such sales in equity, as experience has demonstrated that it is attended with the best results."

Complaint is also made of the provision in the decree (*14*) that the purchaser was "required to assume all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers" (R. 306), and it is stated that the District Court pointed out that this required the purchaser to some extent to buy "a pig in a poke" (R. 153). Counsel for the petitioner is under a misapprehension as to what the Court was criticizing when it made this remark. That remark of the Court referred to the draft decree which was originally submitted by counsel for complainants and which contained provisions requiring the purchaser to assume not only the liabilities of the Receivers under existing executory contracts, leases and agreements, but also all costs, expenses and liabilities of the receivership, including compensation of the Receivers, counsel fees and allowances; substantially all the items which are now to be paid out of the $300,000 fund required by Section 48 of the decree and which has been referred to above. It is not true that "the decree as printed was presented to the District Court and signed" (*14*). The fact is that the decree which was finally signed after two months consideration, embodied numerous changes required by the District Court, among them being the elimination of the above mentioned provisions which the Court had thought objectionable because of their indefiniteness. The Court also insisted upon the insertion in the decree of the provision that $300,000 of the purchase price should be paid

immediately in cash (R. 307). The Court directed the retention of the provision that the purchaser should assume "all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers". We fail to see how the Court could have provided otherwise for the performance of these obligations which had been incurred by the Court's Receivers in carrying on the business. The nature of these contracts, leases and agreements was fully disclosed, however, in the Statement which was filed by the Receivers under Section 54 of the decree (Supp. R. 551).

The provision for the requirement of earnest money to make good a bid is so universal that it requires no comment.

Complaint is also made of the inadequacy of the upset price, upon the basis of the testimony taken before the District Court (*14*). As dealt with at considerable length in our other brief in this case, we have shown that the District Court conducted an extended and impartial investigation of the nature and value of the defendant Corporation's properties, before fixing an upset price for the same, and after the sale there was a further hearing on confirmation of sale, with opportunity for all persons interested to be heard. Petitioner's brief analyzes this testimony in detail (*pages 15 to 18*). Here, again, as in our other brief in this case, we must emphasize that the real question now involved in this case is whether the District Court erred in confirming the bid at the sale held on August 8, 1932, on the basis of the assets as then constituted. At the time of such sale, the amount of cash and equivalent in the hands of the Receivers was not $1,929,807.59, but had been reduced to $1,551,615.78 (R. 402), and there had also been

a shrinkage of more than $200,000 in the notes and accounts receivable, which stood at $858,992.41 on December 31, 1931, and at $641,189.17 on June 30, 1932 (R. 523), a total shrinkage of $595,995.

The Sanderson & Porter appraisal of the Corporation's properties as of December 31, 1926 was merely indicative of their replacement costs.

As for the evidence which was taken preliminary to this hearing in New York, at the office of Bankers Trust Company, it was all of a formal nature, relating to such matters as the making of the Indenture, the issuance of the Debentures and other matters which have never been involved in controversy. An examination of the depositions setting forth such "formal proof", offered in evidence at the hearing on March 3, 1932 (R. 133) and included in the Record (R. 102-130), will show that they relate to nothing involved in controversy here.

The petitioner alludes to the fact that at a meeting of the Reorganization Committee held on November 28, 1931, they gave consideration to the probable amount of the upset price (R. 518). As holders at the time of more than 90% of the Corporation's indebtedness, the Committee were potential purchasers of the Corporation's properties at any judicial sale, and it was of course proper for them to consider what sum they could afford to bid for those properties and with what amount of cash, after provision had been made for the distributive share of non-assenting creditors, the New Company could continue and carry on business.

The petitioner offered no testimony of values and made no suggestion as to how the properties of the Corporation could have been better disposed of than through confirma-

tion of the sale to the Reorganization Committee. The petitioner does not now wish to come into the Reorganization under the Plan, as stated at page 8 of its brief, but wishes, as intimated at page 18, merely to get as large a percentage of its claim as possible.

It is easy to characterize the bid price as "absurd" and "ridiculous" by pointing to the disparity below old book values and by ignoring the condition of the property at the time of sale; but when it comes to the actual problem of liquidating and realizing a larger sum, any liquidator would be faced with the cold, hard necessity of finding buyers. Those who have had experience in attempting to liquidate bankrupt estates know what the difficulties are, and the disastrous results of such liquidations are convincingly depicted in the Report to the President of the United States on the Bankruptcy Act, made by Solicitor General Thacher under date of December 5, 1931.

It may not be amiss in this connection to refer to the history of the reorganization of the National Salt Company which is described in Dewing's "*Financial Policy of Corporations*" page 965. This reorganization took place in the years 1903 and 1904, under the supervision of the Supreme Court of the State of New York. The National Salt Company had numerous plants which were carried as assets on its books at $8,518,306. A civil engineer of large experience had appraised the plants as having a market value of $1,149,200 and a total valuation at forced sale of $694,200. All the plants were offered for sale at public auction in September 1903 and were bid in for $337,500. At a hearing in February 1904, the court refused to confirm the sale because of the inadequacy of the price and the method of sale which had been advertized for only two weeks. The court ordered another sale of the property with

different terms and more publicity and the second sale took place in May 1904. At this sale, these same properties were bid in and sold for $193,310.

Conclusion.

Considering the financial condition of the Corporation, it is obvious that its resources were and are not sufficient to pay all its general creditors in full. If there had been no Plan of Reorganization, and if this Corporation had drifted into bankruptcy, this petitioner could not have hoped to be paid in full, and probably would not have received as large a dividend as will be paid to non-assenting creditors by virtue of the sale already made. Petitioner has not been diligent. It is not fitting that this petitioner should now seek, by attacking the Plan of Reorganization which is eminently fair, to secure an advantage over all other creditors of the same class, which petitioner could not secure in any other way.

Therefore, the decrees of the Courts below should be affirmed.

Respectfully submitted,

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MAYNARD TEALL,
G. FRANKLIN LUDINGTON,
Counsel for Respondents Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation.

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